IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 158

WILLARD CARNLEY,

Petitioner,

—v.—

H. G. COCHRAN, JR., Director of the Division of Corrections, Florida,

Respondent.

PETITIONER'S REPLY BRIEF

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Summary of Argument

The brief of respondent advances two major arguments in support of the ruling of the Court below: first, that petitioner did not prove that any right to counsel was not waived, and second, that failure to appoint counsel for petitioner, when not requested, did not, in the absence of any other prejudicial factor, result in a denial of rights guaranteed by the Fourteenth Amendment. A sufficient answer to both of these arguments is that petitioner alleged in his petition for writ of habeas corpus that he requested defense counsel and protested his inability to conduct a defense, but he was denied a hearing to prove the allegations of his petition. The trial record does not negate petitioner's allegation that he requested defense counsel, nor does it provide any factual basis for concluding that petitioner waived the assistance of counsel.

The Court below referred to a "presumption" of waiver in any case where the trial record shows that a defendant did not have counsel or fails to show whether he did or did not have counsel. No such presumption can be applied by a State, consistent with the Fourteenth Amendment, to overcome a clear allegation that appointment of defense counsel was requested. And in the present case, respondent's return to the petition for writ of habeas corpus did not allege that petitioner in fact waived counsel.

The circumstances of petitioner's trial, as set forth in detail in petitioner's brief on the merits, clearly required the appointment of defense counsel even if it be assumed, contrary to the allegation of the petition for writ of habeas corpus, that petitioner did not request such assistance. A timely request for appointment of counsel has never been required of an illiterate defendant facing serious criminal charges. The absence of counsel to assist petitioner at his trial, under the circumstances of this case, rendered the proceedings lacking in fundamental fairness and thereby deprived petitioner of his liberty contrary to the Fourteenth Amendment to the United States Constitution.

case is completely unlike *Buckner* v. *Hudspeth*, 105 F. 2d 396 (C.A. 10, 1939), cert. den. 308 U.S. 553, relied upon by respondent in his brief, where there were received in evidence depositions of a government investigating agent, of the Judge before whom the case was heard, of the Clerk of the Court, and of a Clerk in the United States Attorney's office, as well as testimony of the petitioner concerning the actual facts of the case.* In the present case there is nothing more than a denial by the respondent that petitioner requested counsel followed by a statement in the opinion of the Court below that wherever a record shows that a defendant did not have counsel or fails to show whether he did or did not have counsel, it will be "presumed" that he waived the benefit of counsel and elected to present his own defense.

If a State can be permitted to apply a "presumption" of waiver in circumstances where the convicted defendant clearly alleges that he requested counsel, where the record of the proceedings clearly does not contradict his allegation, and where there is nothing more than a denial of his allegation with no supporting proof and no opportunity at a hearing to determine the truth of the matter, then the guarantees of the Fourteenth Amendment have been stripped of much of their meaning. All that would be required in any case where the record showed lack of counsel or failed to show whether or not counsel appeared would be for the State to rely on a conclusive presumption that counsel was waived. It is respectfully submitted that no authority supporting the right of a State to apply such a presumption has been cited by respondent, and that in

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* The present case also differs from *Buckner* in that there the court was able to say: "The pleadings and briefs which the petitioner filed in his own behalf in the proceeding below show he is a man of intelligence and education." 105 F. 2d 396, 397.

fact no such rule has been recognized by this Court. This Court noted, in *Johnson* v. *Zerbst*, 304 U.S. 458, 464, that: "'courts indulge every reasonable presumption against waiver'[12] of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights.'"[13]

Petitioner *does not* urge that it is impossible for an accused competently and intelligently to waive his right to counsel (though there may be a serious question as to whether an illiterate accused can do so); petitioner *does* contend that the record in this case provides no basis whatsoever for either a determination or a "presumption" that counsel was waived, and that petitioner should at least be entitled to an opportunity to prove the allegations of his petition for writ of habeas corpus. It should be noted, however, that it is not essential under the decisions of this Court that petitioner establish as a prerequisite to his discharge from custody that in fact the assistance of counsel was requested; this fact is relevant only in considering whether petitioner can be said competently and intelligently to have waived counsel, and it is of course clearly not determinative of that issue.

As noted in Part IV of petitioner's brief on the merits there was no allegation in respondent's return to the petition for writ of habeas corpus that petitioner competently or intelligently waived counsel, and there would appear to be no basis for suggesting a waiver other than by means of the "presumption" referred to by the Court below. Respondent's brief here makes no reference to any portion of the record dealing with the matter. Petitioner again submits, therefore, that he is entitled to immediate discharge and that there is no necessity for remanding this case for a hearing on the truth of his allegations. The record establishes without contradiction petitioner's illit-

eracy, his lack of counsel at the trial, the inflammatory nature of the charges against him, and his inability to conduct any defense without assistance.

II.

The Circumstances of Petitioner's Conviction Were Such That the Absence of Counsel Resulted in a Denial to Him of That Degree of Fairness Required by the Fourteenth Amendment to the Constitution, Even Though It Be Assumed, Contrary to the Clear Allegation of His Petition for a Writ of Habeas Corpus, That Defense Counsel Was Not Requested.

Petitioner's illiteracy, the prejudicial nature of the charges against him, his obvious ignorance and inability to defend himself, and the complex nature of the legal questions involved at his trial have been sufficiently set forth in petitioner's brief on the merits. Respondent contends, however, that notwithstanding these factors, "a holding adverse to respondent in the present case would necessitate an overruling of the *Betts* case, supra" (*Betts* v. *Brady*, 316 U.S. 455) (Respondent's Brief, Page 5). Such a contention ignores the numerous differences between the facts involved in *Betts* v. *Brady* and those of the instant case. There was no evidence in *Betts* v. *Brady* that the defendant was illiterate or otherwise unable to defend himself. This Court noted that the defendant was of ordinary intelligence and ability and had once before been in a criminal court. The charge involved in that case was robbery, a crime less likely to inflame the emotions than the crime of incest. There was no suggestion that legal complexities were involved, and trial was before a judge without a jury. Moreover, the accused was not faced with the necessity of successfully cross-examining his own children in order to establish his innocence.

In view of the requirement that all facts and circumstances be examined in each case involving an alleged denial of Fourteenth Amendment guarantees, petitioner does not contend that a holding against him in the present case would necessarily involve the overruling of other decisions of this Court. It must be noted, however, that the undisputed circumstances of petitioner's trial would seem at least as lacking in fairness as those of other cases in which this Court has found a denial of Constitutional rights. (See *Gibbs* v. *Burke*, 337 U.S. 773, *Cash* v. *Culver*, 358 U.S. 633, *Hudson* v. *North Carolina*, 363 U.S. 697, *McNeal* v. *Culver*, 365 U.S. 109.)

Respondent urges that to require the appointment of counsel in petitioner's case would necessitate appointment by the States of counsel in all civil cases. The argument apparently is that since life, liberty and property are each protected against certain State action by the Fourteenth Amendment, the elements of due process of law with respect to each must be identical. Even if it be conceded that State action is involved in recourse to the courts in all civil cases, the argument obviously overlooks the fact that what constitutes due process of law in each type of case may vary. It has long been recognized, for example, that in cases involving possible deprivation of life (capital cases), assistance of counsel must be supplied by the State regardless of the circumstances (*Powell* v. *Alabama*, 287 U.S. 45), whereas in cases involving possible loss of liberty (non-capital cases), no such requirement exists. *Betts* v. *Brady*, 316 U.S. 455. Respondent apparently urges that even though the elements of due process of law imposed upon a State may vary as between cases involving life on the one hand and liberty on the other, they may not vary as between cases involving liberty on the one hand and property on the other. The argument is obviously

not sound. It is thus apparent that a conclusion in this case that petitioner was deprived of Constitutional rights would not compel the conclusion that counsel must be furnished in all civil cases. In fact, even if it were to be held that in every case involving serious criminal charges counsel is required unless intelligently and competently waived, such holding would be consistent with denial of State-appointed counsel in civil cases.

Respondent urges that the overall proceedings surrounding petitioner's conviction must be examined, citing *Gallegos* v. *Nebraska*, 342 U.S. 55, and *Quicksall* v. *Michigan*, 339 U.S. 660. The petitioner is in complete accord with this proposition. As urged in his brief on the merits, the record of his trial in this case clearly reveals his total inability to present any defense without assistance, and shows, in the language of petitioner's application for a writ of habeas corpus, that he was "incompetent to conduct one single essential of a legal defense" (R. 3).

Respondent also urges that all the complexities involved in the trial proceedings were resolved in petitioner's favor. It is far from clear, however, that counsel might not have convinced the trial court to commit petitioner for treatment pursuant to Section 801.03(1)(b) Florida Statutes, and stay further criminal proceedings against him, or even to suspend execution of judgment against him pursuant to Section 801.08, Florida Statutes. It is clear, moreover, that the trial court had no opportunity to consider the constitutionality of Chapter 801 as applied to petitioner's case, if in fact the incest count was based on Chapter 801 as stated by the Florida Supreme Court in its opinion (R. 74). Petitioner clearly failed to receive the possible benefit of jury instructions such as were given in *Howell* v. *State*, 102 Fla. 612, 136 So. 456, reversed on re-hearing on other grounds, 102 Fla. 612, 139 So. 187, and he was deprived

of assistance in cross-examining his children and in presenting his own testimony. In all of these respects the trial court cannot be said to have resolved the issues in petitioner's favor.

In *Bute* v. *Illinois*, 333 U.S. 640, relied on by respondent, a single charge of "taking indecent liberties with children" was involved. There was no evidence to show a lack of intelligence or ability of the petitioner to understand the nature of the charges against him; there was no allegation that counsel had been requested; there was no indication that the defendant would have been confronted at a trial with the necessity of cross-examining his own children; and in fact it appears that the petitioner there persisted in a plea of guilty to the charge against him after a full explanation of the consequences of such a plea by the court. In all these respects the facts of that case differ from the present case.

The foregoing makes plain petitioner's need for the assistance of counsel at his trial. Respondent answers that petitioner did not request such assistance. Even if it be assumed that such was the case, this Court has never required a defendant, ignorant of his rights, to make such a request as a condition precedent to invoking the Constitutional safeguards. See *Uveges* v. *Pennsylvania*, 335 U.S. 437. It is obvious that such a rule would deprive those defendants in the greatest need of the required assistance.

Conclusion

There is no dispute that the charges against petitioner at his trial were both serious and of an inflammatory nature. There is no dispute that petitioner is illiterate and that he had no assistance of counsel in presenting his defense. The argument of respondent in this Court is that petitioner failed to request counsel, and that since he had no counsel, he must be presumed to have waived such assistance. In the absence of any allegation or evidence that counsel was competently and intelligently waived a State cannot indulge a "presumption" of such a waiver.

Respondent's return to the petition for writ of habeas corpus did not allege a waiver by petitioner of the assistance of counsel. Under these circumstances petitioner respectfully submits that the undisputed facts of his trial clearly render his conviction lacking in that fundamental fairness required by the Fourteenth Amendment to the United States Constitution and entitle him to immediate discharge. In any event, petitioner submits that the allegations of his petition for writ of habeas corpus were sufficient to require the Court below to conduct a hearing with respect thereto, and in the absence of evidence that he competently and intelligently waived the right to assistance of counsel, established his right to immediate discharge.

Respectfully submitted,

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